a landlord had let certain premises and had agreed not to raise the rent or to give notice to quit so long as the the tenant paid the rent when due. This agreement was in writing. The landlord and tenant also agreed verbally that the landlord should let the tenant remain in the premises for such a term of years, not exceeding the landlord's term, as the tenant might desire to be the tenant. A railway company agreed to buy the tenant's interest and then disputed that he had an interest. Malins V.C. said that: —

"... upon principle, I am perfectly satisfied that a tenant who has an agreement with his landlord that the landlord will not turn him out so long as he pays his rent, has a right to retain possession as long as the landlord's interest exists."

He went on to say that such a tenant's right to possession would be enforced in equity.

In *Kusel* v. *Watson*[3] a lessee of a house let it to Kusel at a fixed rent, agreed to let him have a lease at the same rent "at any period he may feel disposed" and further agreed not to molest or disturb him or raise his rent after Kusel had spent money improving the premises. Kusel, who had spent money on the premises and had occupied them, claimed against the personal representative of his landlord specific performance of the agreement. He succeeded at first instance, Bacon V.C. holding that he was entitled to have an underlease of the whole of his landlord's term less one day. On appeal, Jessel M.R., in the course of the argument, suggested that the agreement meant that the landlord was to grant as long a lease as he could, and the Court of Appeal directed that he should be granted a lease for the residue of his landlord's term less one day, if he should so long live.

In *Inwards* v. *Baker*[4] a son had built a bungalow on his father's land and had lived in it thereafter in the expectation and belief that he would be allowed to remain there for his lifetime or for so long as he wished. The trustees of his father's will brought proceedings for the possession of the bungalow. In that case Lord Denning M.R. said at page 37: —

"... in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable so to do. In this case it is quite plain that the father allowed an expectation to be created in the son's mind that the bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain his home. It seems to me, in the light of that equity, that the father could not in 1932 have turned to his son and said: 'You are to go. It is my land and my house'. Nor could he at any time thereafter so long as the son wanted it as his home."

and Danckwerts L.J. said: —

"... this is one of those cases of an equity created by estoppel, or equitable estoppel, as it is sometimes called, by which the person who has made the expenditure is induced by the expectation of obtaining protection, and equity protects him so that an injustice may not be perpetrated."

In the light of these decisions the case of *Hajara Singh* v. *Muthukaruppan*[5] where the appellant alleged that there was an oral agreement between him and the owner of the land allowing him to occupy the land for as long as he wished during his lifetime, and where he had occupied the land and paid rent and also erected a house on it, and had judgment for possession of the premises given against him, must, as Ong C.J. said in his judgment in this case, be regarded as wrongly decided.

In this case the respondent occupied the ground floor since February 1958 and paid rent therefor. In February 1958 he paid the sum of $8,000 to his landlord. He cannot have done that for a tenancy of short duration. It must have been paid in consideration of the tenancy described in the agreement of 1st June 1964.

In these circumstances there arose in the respondent's favour an equity or equitable estoppel protecting his occupation of the ground floor for the period of thirty years, that is to say, until the 28th February 1988. In their Lordships' opinion the order made herein by the Federal Court of Malaysia (Appellate Jurisdiction) should be affirmed and the appeal dismissed.

Their Lordships will report their opinion to the Head of Malaysia accordingly. They will also report that the appellants should pay the respondent's costs of the appeal.

Appeal dismissed.

Solicitors: *Bulcraig & Davis; Stephenson Harwood & Tatham.*

PEGANG MINING CO. LTD. v. CHOONG SAM & ORS.

[P.C. (Lord Wilberforce, Lord Hodson, Lord Pearson, Lord Diplock and Lord Simon of Glaisdale) March 7, 1973]

[Privy Council Appeal No. 1 of 1971]

Mining — Mining lease — Comprehensive mining scheme — Agreement not to obstruct or interfere with acquisition by the head-lessor of land in vicinity — Whether there is implied agreement to include such land in comprehensive mining scheme — Implied term — Mining Enactment (Cap. 147), s. 20.

In this case the appellant had obtained various plots of land for mining and had sub-leased it to a sub-lessee who in turn sub-sub-leased it to a miner. It was agreed between the parties that the various plots should be worked in one comprehensive mining scheme, so as to obtain the benefit of section 20 of the Mining Enactment, which enabled permission to be granted on behalf of the Government to any person holding lands under more than one title, whether as lessee, sub-lessee or sub-sub-lessee to treat the aggregate area of his holding as a single mine and to set to work upon any part of that area where they could be used to best advantage, the total number of labourers or equivalent labour saving apparatus which, but for such permission, he would have been required under each separate head-lease to be kept at work on the particular area subject to that lease. The appellant obtained certain other lands in the vicinity and also obtained renewals of leases held by them. It was contended on behalf of the respondents that there was implied in the sub-lease and sub-sub-lease to them an agreement by the parties as to the obligations of each of them in relation to the inclusion in the comprehensive mining scheme of any

vicinal land or ancillary rights therein which the appellant may acquire in the future, and in respect of which it has at any time communicated to the sub-lessee or to the miner its desire to include in the scheme. It was therefore contended by the respondent that the appellant was obliged in accordance with such implied term to sub-let the lands obtained by it to the sub-lessee, who in turn was obliged to sub-let them to the miner. The High Court held that no such term could be implied. On appeal the Federal Court held that it could and they ordered the company to execute a sub-lease of the lands to the sub-lessee and the sub-lessee to execute a sub-sub-lease in favour of the miner. The appellants appealed against the order of the Federal Court.

Held, allowing the appeal: it was impossible in this case to imply covenants on the part of the sub-lessee to accept from the appellants a sub-lease of the lands upon reasonable terms and to grant also upon reasonable terms, a sub-sub-lease of them to the miner, and covenants on the part of the miner to accept such sub-sub-lease and to apply for permission to include the land in the comprehensive mining scheme. In the circumstances no such term as contended for by the respondents could be implied in the sub-lease.

PRIVY COUNCIL.

J. G. Le Quesne, Q.C. and *Datuk Eusoffe Abdoolcader* (*G. Newman* and *N. T. Rajah* with them) for the appellant.

E. F. N. Gratiaen, Q.C. (*E. Cotran* and *D. Hands* with him) for the first respondent.

Sir Dingle Foot, Q.C. (*J. A. Baker* and *R. Khoo* with him) for the second respondent.

Lord Diplock (delivering judgment of the Board): This appeal from the Federal Court of Malaysia is about the right to mine tin in an area of land near Papan Town in the State of Perak, and, in particular, in what was formerly part of the Railway Reserve for the Ipoh-Tronoh line. It turns upon the meaning of a forty-year-old agreement dated 22nd October, 1931. To this agreement there were three parties described as "the company", "the sub-lessee" and "the miner". The company is the appellant in this appeal, the interest of the sub-lessee in the agreement has devolved upon the second respondent and the interest of the miner is represented in this appeal by the first respondent as a consequence of events which it is no longer necessary to canvass in order to dispose of the appeal. Their Lordships will adopt the expressions "the company", the "sub-lessee" and "the miner", as referring also to those persons by whom the corresponding interest of the original party to the agreement was from time to time represented.

At all material times mining lands in Perak have been vested in the Sultan and the working of minerals regulated by the Mining Enactment. This provided for the grant of mining leases which imposed upon the lessee an obligation to carry on mining operations upon the land subject to the lease and for that purpose to employ at work on that land a specified number of labourers or equivalent labour-saving apparatus. It authorised the grant by the lessee of sub-leases and by sub-lessees of sub-sub-leases but only upon the terms prescribed by the Enactment. These terms provided that the sub-lessee or sub-sub-lessee should work the minerals in accordance with the terms of the head-lease and should pay tribute to the sub-lessor at an agreed rate calculated on the total amount of ore removed from the land. Section 20 of the Mining Enactment enabled permission to be granted on behalf of the Government to any person holding lands under more than one title whether as lessee, sub-lessee or sub-sub-lessee to treat the aggregate area of his holding as a single mine and to set to work upon any part of that area where they could be used to best advantage, the total number of labourers or equivalent labour-saving apparatus which, but for such permission, he would have been required under each separate head-lease to be kept at work on the particular area subject to that lease.

In 1931 the company was engaged in the business of prospecting for tin. It did not undertake actual mining operations. It acquired head-leases of mining lands which it had prospected and entered into sub-leases (in the form provided in the Mining Enactment) with persons who undertook the actual mining operations.

In the early part of 1931 there were fourteen plots of mining land near Papan Town held under separate head-leases. The company was head-lessee of numbers 1 to 4. It had sub-let them to the sub-lessee who was mining them himself. Head-leases of the plots numbered 5 to 14 were held, as to one by the company, five by the sub-lessee and four by various third parties. These ten plots were sub-let to the miner, who was mining them. All fourteen plots were adjacent to one another except that across them from east to west there ran the Railway Reserve, a strip of about 18 acres in extent, which was not available for mining. The eastern part of this strip lay between the company's plot 2 on the north and plot 3 on the south; the western part lay between plots 6 and 7 on the north and plot 5 on the south.

The company was dissatisfied with the way in which the sub-lessee was mining plots 1 to 4. Agreement was reached between the company, the sub-lessee and the miner that all fourteen plots should in future be worked by the miner as one mine known as the Khong Heng Kongsi Mine, under a comprehensive mining scheme described as the "Kacha and Menelai Comprehensive Mining Scheme" for which permission was to be sought from Government under section 20 of the Mining Enactment. This would make it necessary for the right to work the minerals in all fourteen plots to be vested in the miner. Accordingly the sub-lessee discontinued his own mining operations on plots 1 to 4 and granted to the miner sub-sub-leases of them, reserving to himself a higher rate of tribute than that payable by him to the company under his own sub-leases.

It was this scheme which gave rise to the agreement of 22nd October 1931 and is referred to in the recitals. The operative clauses set out the conditions upon which the company's approval to the scheme was given.

Clause 1, the effect of which is long spent, provides for the manner in which the minerals in plot 2 shall be worked. By clause 2 the company released the sub-lessee from a previous obligation to erect a pumping station. By clause 3 the company undertook to co-operate in seeking Government permission to operate the Comprehensive Mining Scheme and also undertook to renew from time to time the sub-leases

granted by them to the sub-lessee over plots 1 to 4 "so far as such sub-leases shall be required for the proper carrying out of the said Mining Scheme."

Clause 4, upon which this appeal mainly depends, reads as follows:

"The sub-lessee and the miner and each of them hereby undertake and agree that they will not nor will either of them in any way obstruct or interfere with or attempt to obstruct or interfere with the acquisition by the company (or its nominees) in the vicinity of the said Khong Heng Kongsi Mine of any mining lands or any right, title or interest therein (including water rights, rights of depositing tailings or other rights incidental to mining) which the company may desire to acquire for the purpose of including same in the said mining scheme and the sub-lessee and the miner hereby undertake and agree further that they and each of them will use their best endeavours to assist the company in acquiring such mining lands or interest therein."

Clause 5 provides for forfeiture of any sub-leases or sub-sub-leases granted by the company in the event of any breach by the sub-lessee or miner of any of the conditions of the agreement.

Clause 6 is an arbitration clause in the following terms:

"If and whenever any difference shall arise between the parties hereto or any of them or their successors or representatives respectively as to the construction, effect, incidence or consequence of this agreement or any part thereof or otherwise relating to the premises, every such difference shall be referred to arbitration in pursuance of the provisions of 'The Arbitration Enactment 1912' or any legislative modification or re-enactment thereof."

The agreement had a long, chequered and disputatious history to which their Lordships do not find it necessary to advert in any detail. It is sufficient to say that during the Japanese occupation the railway line upon the Railway Reserve was taken up and, after the liberation of Malaya, the Reserve became potentially available for mining. It was rich in tin and as early as 1946 the company applied to the Government for a head-lease of it. At that date it was the intention of all the parties that if the application were successful the Railway Reserve would be included in the Kacha and Menelai Comprehensive Mining Scheme and sub-let by the company to the sub-lessee who would in turn sub-let it to the miner.

There was a very long delay in dealing with the company's application which was renewed from time to time. In the meantime disputes on other matters arose between the parties and in 1956 the company informed the miner that it was no longer prepared to commit itself to include the Railway Reserve in the Kacha and Menelai Comprehensive Mining Scheme if its application for a head-lease should be successful. It was not until 31st March 1959 that Government approval was ultimately given to the issue of a head-lease of the Railway Reserve to the company.

The company decided not to include the Railway Reserve in the Kacha and Menelai Comprehensive Mining Scheme but to mine the land itself. It refused to grant a sub-lease to the sub-lessee or to the miner. The instant action was brought by the miner to compel the company to grant a sub-lease of the Railway Reserve to the sub-lessee and to compel the sub-lessee to execute a sub-sub-lease of it to the miner. The sub-lessee was thus formally a defendant to the action, but has throughout supported the miner's claim and expressed his willingness to grant a sub-sub-lease to the miner if the Railway Reserve is sub-let to him by the company.

In the action the miner also made similar claims in relation to other plots of mining lands of which the company had acquired head-leases. Their Lordships, however, propose in the first instance to confine their attention to the claim in respect of the Railway Reserve.

The contention of the miner and the sub-lessee is that the obligation of the company to sub-let the Railway Reserve to the sub-lessee arises by necessary implication from the provisions of clause 4 of the agreement of 22nd October, 1931. The High Court in Malaya at Ipoh (Ali J.) held that no such term could be implied. On appeal the Federal Court of Malaysia held that it could. The Federal Court ordered the company to execute a sub-lease of the Railway Reserve in favour of the sub-lessee and the sub-lessee to execute a sub-sub-lease of it in favour of the miner. It is against that order that this appeal is brought.

Clause 4 of the agreement contemplates the possibility of future additions to the area of the Kacha and Menelai Comprehensive Mining Scheme by including in the Khong Heng Kongsi Mine additional mining lands or ancillary rights therein in the vicinity of any of the fourteen plots which were the subject of the application made to the Government in 1931 and are set out in the schedule to the agreement. The Railway Reserve clearly falls within the description of mining lands within the vicinity of the Khong Heng Kongsi Mine. Under section 20 of the Mining Enactment any such addition to the area of the Comprehensive Mining Scheme could only be made in respect of land in which the miner himself had mining rights whether as head-lessee or as sub-lessee or as sub-sub-lessee, and the miner alone would have any *locus standi* to apply for permission for its inclusion. Clause 4 contemplates only the inclusion in the Comprehensive Mining Scheme of additional land or ancillary rights in which the company itself acquires an interest whether as head-lessee or sub-lessee. Such acquisition could, however, be no more than a first step towards the inclusion of the additional land in the Mining Scheme. It would have to be followed by a second step, the vesting in the miner either by way of sub-lease or sub-sub-lease of the right to mine the additional land, and by a third step, the application by the miner for permission to include the additional land in the Kacha and Menelai Comprehensive Mining Scheme.

Of these three steps, which would be necessary to obtain any extension of the area of the Comprehensive Mining Scheme, Clause 4 deals with the first alone, at any rate expressly. The only express covenants that it contains are on the part of the sub-lessee and of the miner and impose upon them obligations which are confined to the period while additional land which the company may desire to include in the scheme is in course of being acquired by the company. They are not to compete, but to co-operate in its acquisition by the company. As soon as the additional land has been acquired by the company these express covenants are spent.

Taken by themselves without any additional implied obligations on any of the parties to the agreement the express covenants are not devoid of practical business effect. They enable the company to prevent the extension of the Comprehensive Mining Scheme to vicinal land in which the company has not been given by the sub-lessee and the miner an opportunity to acquire an interest superior to either of them. As appears from the judgment of the Federal Court it was known to be the practice of the Government in the event of competing applications for head-leases of mining lands to give preference to an applicant who intended to undertake the mining operations himself. In the absence of the express covenants in clause 4, at any rate by the miner, he would be in a favourable position to prevent the company from acquiring a superior interest in any additional land which might be profitably included in the Comprehensive Mining Scheme, and his bargaining position *vis-à-vis* the company in the event of an extension of the scheme being contemplated by the parties to the agreement would be correspondingly improved.

Clause 4 imposes no obligation upon the company itself to acquire any vicinal land for inclusion in the scheme. It requires no consent by the sub-lessee or miner to the company's decision to acquire it. It imposes no prohibition upon the company's acquiring vicinal land for the purpose of dealing with it outside the Comprehensive Mining Scheme, though its acquisition of the land would not in that event attract the benefit of the covenants by the sub-lessee and the miner not to make competing applications. Nothing at all is said in clause 4 about any further steps to be taken by any of the parties after vicinal land which the company does desire to include in the Comprehensive Mining Scheme has been acquired by the company, in order to secure that the land is so included. Although it is implicit, because the Mining Enactment so requires, that the miner shall have an interest either as sub-lessee or as sub-sub-lessee in any land which is included in the scheme, clause 4 is wholly silent as to the terms on which that interest of the miner is to be held. It is also silent as to whether the sub-lessee is to have any interest intermediate to those of the company and of the miner, and as to the terms on which the sub-lessee's interest, if any, is to be held.

It has already been pointed out that the express covenants in clause 4 are not devoid of practical business effect if what was contemplated by the parties was that any addition to the area of the Comprehensive Mining Scheme by the inclusion of vicinal land should be made by mutual agreement between all the parties to the agreement of 22nd October, 1931, upon terms to be negotiated and agreed between them, as to their respective interests in the land and obligations towards one another in relation to it, and that the company's application to acquire the land should be made pursuant to such agreement. Yet the respondents' contention is that the clause was intended to have a much more extensive business effect and that it contains by necessary implication an already existing agreement by the parties as to all the obligations of each of them in relation to the inclusion in the Comprehensive Mining Scheme of any vicinal mining land or ancillary rights therein which the company may acquire in the future, and in respect of which it has at any time communicated to the sub-lessee or to the miner its desire to include it in the scheme.

Since the only express covenants in clause 4 are on the part of the sub-lessee and of the miner and relate only to the first of the three steps which are necessary to obtain the inclusion of additional land in the Comprehensive Mining Scheme it is convenient to consider first what additional covenants on their part are sought to be implied by the respondents. It is not contended that while the first step is being taken, *i.e.* during the period while the land is in the course of being acquired by the company, the express covenants require to be supplemented by any implied covenants by the sub-lessee or the miner. The covenants sought to be implied relate mainly to the second step; the vesting in the miner of an interest as sub-lessee or sub-sub-lessee of the land acquired so as to qualify him to obtain permission to include the land in the Comprehensive Mining Scheme under section 20 of the Mining Enactment.

The respondents' contention is that in order to give business efficacy to the agreement it is necessary to imply covenants on the part of the sub-lessee to accept from the company a sub-lease of the land upon reasonable terms and to grant, also upon reasonable terms, a sub-sub-lease of it to the miner, and covenants on the part of the miner to accept sub-sub-lease and to apply for permission to include the land in the Comprehensive Mining Scheme.

In their Lordships' view such an implication is quite impossible. It is conceded that clause 4 applies to any land which the company may desire to have included in the Comprehensive Mining Scheme, whether or not their desire is shared by the sub-lessee and the miner. Under the Mining Enactment the only terms on which a sub-lease or a sub-sub-lease may be granted incorporate covenants by the sub-lessee or sub-sub-lessee in possession to extract ore from the land and to pay tribute to his immediate lessor calculated upon the gross sale price of the quantity of ore extracted. All the risk of the ore's proving to be uneconomical to mine falls upon the person in possession, whether as sub-lessee or sub-sub-lessee, who conducts the actual mining operations on the land. Neither his immediate nor any superior lessor runs any risk. Tribute is payable to them irrespective of the profit or loss at which the mining operations are carried on. Yet the covenant on the part of the miner which is sought to be implied would entitle the company to force upon him an obligation to extract ore from vicinal land and to pay tribute for doing so, notwithstanding that in his opinion and in actual fact the ore could only be extracted at a loss which he would have to bear himself. In their Lordship's view no rational business man could be expected to accept an obligation so hazardous and so onerous.

But the respondents' difficulties do not stop there. Even if it were assumed (as was not, and in view of the fluctuating price of tin could not be, proved to be the fact) that *all* vicinal land would at all times in the future be capable of being mined at a profit

clause 4 throws no light upon the terms of any sub-lease to the sub-lessee or sub-sub-lease to the miner. Indeed no intermediate sub-lease to the sub-lessee is needed to enable any vicinal land to be included in the Comprehensive Mining Scheme.

The respondents seek to overcome this difficulty by relying on an implication that the terms of any sub-lease or sub-sub-lease must be "reasonable". But this is too uncertain to be capable of giving rise to any obligation enforceable at law unless it is possible for a court or arbitrator to identify the criteria by which the "reasonableness" of each such term is to be tested. If all that were contemplated were a sub-lease granted directly by the company to the miner it might be possible by using as criteria the rates of tribute actually reserved by comparable current sub-leases which had been negotiated between other persons, a rate of tribute which would be "reasonable" in respect of land acquired by the company which could be mined at a profit; and as between the parties it might be "reasonable" for the period of the sub-lease to correspond with that of the company's head-lease, since that would be the period chosen by the company itself as an appropriate period for which the land should be included in the Comprehensive Mining Scheme. But if instead of a direct sub-lease by the company to the miner there is to be a sub-lease to the sub-lessee and a sub-sub-lease from him to the miner, it is impossible to identify any criteria by which the reasonableness of the tribute payable by the sub-lessee to the company can be tested. Unlike the company, which will have investigated the potentialities of the land and may have been required by Government to prospect it before its head-lease of it was granted, the sub-lessee will have done nothing in return for any difference between the tribute payable to him by the miner under the sub-sub-lease and the tribute payable by him to the company under the sub-lease. "Reasonableness" cannot provide a criterion for determining what this should be. It can only depend upon the relative strength of the bargaining positions of the parties to the sub-lease and the sub-sub-lease and of their desire to enter into them at the time of commencement. *Ex hypothesi*, if the respondents' contention is right, neither party has any bargaining position, since the agreement to enter into both the sub-lease and the sub-sub-lease has already been concluded.

Furthermore in addition to the reservation of tribute and the period, the Mining Enactment provides for the inclusion in sub-leases and sub-sub-leases of special terms to suit the particular circumstances of individual plots of mining land. The Railway Reserve itself affords an example of a case where there might be need for special terms. The head-lease granted to the company contained terms which obliged the company to pay for the cost of diverting to some other site a water pipe line situated on the Reserve and to execute works for the filling and levelling of part of the land. It is not, in their Lordships' view, possible to identify any criteria of "reasonableness" which, in default of specific and express agreement between the parties, would enable a court or arbitrator to determine the manner or extent to which the performance or the cost of obligations such as these should be allocated as between the company, the sub-lessee and the miner by the terms of the sub-lease and sub-sub-lease. Terms such as these too can only depend upon the relative bargaining strength of each of the parties.

The respondents have suggested, in the alternative, that the absence of any objective criterion of "reasonableness" is made good by the existence of the arbitration clause. This would be to substitute for an agreement to enter into sub-leases and sub-sub-leases the terms of which are ascertainable by the application of a criterion which has already been agreed, an agreement to accept sub-leases and sub-sub-leases on whatever terms the person who happens to be appointed as arbitrator may choose to select at a future date. It is no doubt possible for parties to enter into a binding agreement to execute a lease of land upon terms to be fixed by a third party specified in the agreement. But in fixing such terms the third party is not performing any functions of an arbitrator nor determining any "difference" between the parties within the meaning of an arbitration clause. Clause 6 of the agreement of 22nd October 1931 is an ordinary arbitration clause and nothing more. An arbitrator acting under it cannot make a fresh contract between the parties, or force upon any of them terms which they have not previously agreed.

It is not contended by the respondents that there can be implied from the express provisions of clause 4 any unilateral obligation upon the company to make an offer to the sub-lessee to enter into a sub-lease on reasonable terms of any land which it may acquire for the purpose of including it in the Comprehensive Mining Scheme, unless there is a corresponding implied obligation upon the sub-lessee to accept the sub-lease and also reciprocal obligations on the sub-lessee and miner to enter into a sub-sub-lease of the same land. The implied covenant by the company which the respondents seek to enforce in this appeal thus stands or falls with the implied covenants by the sub-lessee and the miner. It accordingly falls for the reasons which have already been given.

This makes it unnecessary to do more than mention a further difficulty in seeking to apply to the Railway Reserve the implied covenant which has been contended for. By the time the company acquired an interest in it in 1959 it was no longer land that the company desired to acquire for the purpose of including it in the Comprehensive Mining Scheme. It had originally been brought within the ambit of clause 4 in 1946 so as to attract the express covenants by the sub-lessee and the miner to co-operate and not to compete with the company's acquisition of it because the company did then desire to include the Railway Reserve in the Scheme and so informed the sub-lessee and the miner. But these covenants ceased to apply to the Railway Reserve after 1956 when the company changed its mind as to the inclusion of it in the Comprehensive Mining Scheme. The sub-lessee and the miner were then free to compete with the company for its acquisition and the latter in fact did so, though without success. Though it is unnecessary to decide the point, their Lordships would observe that it is at least open to doubt whether at the relevant time at

which the covenants sought to be implied would have come into operation (*viz.* the date of acquisition of the company's leasehold interest in the Railway Reserve), that land fell within the ambit of clause 4 at all.

Accordingly the respondents' claim in respect of the Railway Reserve must fail.

In the action the respondents also claimed to be entitled to sub-leases and sub-sub-leases of three plots of land scheduled in the agreement of 1931 as being included in the Kacha and Menelai Comprehensive Mining Scheme but in which the company then had no interest. The head-leases of these plots subsequently expired and the company acquired new head-leases of them itself at the same time as it acquired a head-lease of the Railway Reserve. This claim fails for the same reason as the claim in respect of the Railway Reserve and for the additional reason that these plots were not land "in the vicinity" of the Khong Heng Kongsi Mine within the meaning of clause 4. They were themselves part of that mine.

Reference must finally be made to plots 2 and 3. When the action was started sub-leases of these plots by the company to the sub-lessee and sub-sub-leases by the sub-lessee to the miner were still current. These expired between the date of the trial and the hearing of the appeal to the Federal Court and on the appeal the respondents' claim was treated as amended by inclusion of a claim for the renewal of these sub-leases and sub-sub-leases though not of the sub-lease and sub-sub-lease of plot 1 which had similarly expired. So far as this is a claim against the company it does not depend upon any covenant to be implied from clause 4 but upon the express covenant by the company in clause 3 of the agreement of 22nd October 1931 to renew such sub-leases from time to time "so far as such sub-leases shall be required for the proper carrying out of the said Mining Scheme" *sc.* the Kacha and Menelai Comprehensive Mining Scheme. This claim though granted by the order of the Federal Court is not expressly referred to in the reasons for their judgment. Their Lordships assume that the Federal Court directed their minds to the question whether the renewal of the sub-leases was required for the proper carrying out of the Comprehensive Mining Scheme. But they must have done so on the basis, which their Lordships have now held to be erroneous, that the Scheme included the extraction of tin on the Railway Reserve. Whether there is any tin ore remaining on plots 2 or 3 capable of being extracted otherwise than at a loss, after allowing for the payment of tribute under the renewed sub-lease, if the miner has no right to extract ore from the Railway Reserve has never been considered. Yet this is the relevant question in deciding whether a renewed sub-lease is required for the proper carrying out of the Comprehensive Mining Scheme.

Their Lordships will accordingly advise His Majesty the Yang di-Pertuan Agong that this appeal should be allowed, and the order of the Federal Court of Malaysia set aside and the case remitted to the High Court in Malaya at Ipoh to determine, in the light of their Lordships' opinion, the issue as to whether the sub-lessee is entitled to renewal of sub-leases by the company over plots 2 and 3.

Their Lordships will also advise that the 1st and 2nd respondents should pay the appellant's costs of the appeal to the Federal Court and of this appeal.

Appeal allowed.

Solicitors: *Parker, Garrett & Co.; Graham Page & Co.*